INDEX.

	PAGE
PETITION FOR REHEARING	1
GROUNDS OF THIS PETITION	2
CONCLUSION	9

TABLE OF CASES.

Chanler v. *Kelsey*, 205 U. S. 466, 482	5
Colorado National Bank v. *Bedford*, 310 U. S. 41, 52	5
Continental Assurance Co. v. *Tennessee*, 85 L. Ed. 42	6
Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292, 294	5
Curry v. *McCanless*, 307 U. S. 357	7
Dewey v. *Des Moines*, 173 U. S. 193, 199	7
Equitable Life Assurance Society v. *Pennsylvania*, 238 U. S. 143	7
Hertz v. *Woodman*, 218 U. S. 205, 212-13	8
Keokuk & Hamilton Bridge Co. v. *Illinois*, 175 U. S. 626, 633	7
Lawrence v. *State Tax Commission*, 286 U. S. 276	4, 5
Minnesota ex rel. Pearson v. *Probate Court*, 309 U. S. 270, 274	8
Morehead v. *New York, ex rel. Tipaldo*, 298 U. S. 587, 609	5

PAGE

New York v. *Kleinert*, 268 U. S. 646, 650 7

Provident Savings Life Assurance Society v. *Kentucky*, 239 U. S. 103, 111 6

Southern Railway Co. v. *Kentucky*, 274 U. S. 76, 90-91 (dissenting opinion by Brandeis, J.) 7

State ex rel. Froedtert G. & M. Co. Inc. v. *Tax Commissioner*, 221 Wis. 225, 233 ..... 2, 3

Welch v. *Henry*, 305 U. S. 134..... 4

Wisconsin v. *J. C. Penney Company* (No. 46, October Term, 1940) 1, 2, 3, 6, 8, 9

STATUTES.

Section 3(1), Chapter 505, Laws of Wisconsin, 1935, as amended 2

Section 4(4), Chapter 71, Laws of Wisconsin, 1933.. 4

N. Y. Penal Law, § 664 ..... 6n

Berle, Modern Corporations and Private Property 167n. 25 ..... 6n

Supreme Court of the United States,

OCTOBER TERM—1940.

No. 47

STATE OF WISCONSIN and ELMER E. BARLOW, as Commissioner of Taxation of the State of Wisconsin,
Petitioners,
against
F. W. WOOLWORTH CO.

PETITION FOR REHEARING.

F. W. Woolworth Co., for its petition for rehearing of the judgment of this Court announced December 23, 1940, respectfully shows:

The case is before this Court on writ of certiorari to the Supreme Court of Wisconsin to review a decision of that Court (233 Wis. 305), which held that the Wisconsin Privilege Dividend Tax Act was invalid as to F. W. Woolworth Co. (hereinafter sometimes termed "Woolworth"), a foreign corporation.

This Court, by its judgment, announced December 23, 1940, directed that the case be reversed and remanded for the determination of such questions as were open in the light of its opinion handed down December 16, 1940 in *Wisconsin* v. *J. C. Penney Company* (No. 46, October Term, 1940). The Woolworth case was decided on the authority of the *Penney* case, just referred to, and no separate opinion

was written, the matter being disposed of by an order of the Court, as follows:

> "Per curiam: Judgment reversed on authority of Wisconsin *v.* Penney Company, No. 46, decided Dec. 16, 1940. Mr. Justice Stone took no part in the consideration or decision of this cause."

Grounds of this Petition.

1. This Court decided the case on the basis of a new interpretation of the Wisconsin Privilege Dividend Tax Act, which had not been adopted by the Wisconsin court, and which had not been argued before this Court.

The Court treated the statute as imposing a supplemental corporate income tax—a view which no one had previously advanced, and which can be demonstrated to be untenable.

The statute (Section 3(1), Chapter 505, Laws of Wisconsin, 1935, as amended), describes the tax as being "For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state . . . "

The Wisconsin Supreme Court has construed the statute as imposing "an excise or privilege tax upon the transaction involved of transferring the dividends from the corporation to its stockholders" (*State ex rel. Froedtert G. & M. Co. Inc.* v. *Tax Commissioner,* 221 Wis. 225, 233), or, differently stated, as "an excise tax on the transfer of earnings resulting from property located or business transacted within this state" (Id., p. 240). On the basis of that interpretation, it ruled in the *Froedtert* case that the taxability of dividends declared outside Wisconsin by a foreign corporation would depend upon their having a "constructive situs" within Wisconsin (p. 245). It was only on the basis of this possible constructive situs that the *Froedtert* case held that the tax might be valid as to foreign corporations; but the Wisconsin court, in the *Penney* case, found (233 Wis. at 296) that there was no evidence of any business situs in Wisconsin, and the

Woolworth case involved the same facts on that point (R. 78).

In the present case the Wisconsin Supreme Court adhered to the interpretation of the statute adopted in the *Froedtert* case, as "an excise or privilege tax upon the transaction involved of transferring dividends from the corporation to its stockholders" (233 Wis. at 291). No other interpretation of the tax was suggested, the Court stating:

> "Diligent and able counsel for the State have been unable to suggest any other basis upon which the tax involved in this case can be sustained than that suggested in the *Froedtert* case" (233 Wis. at 297).

In the Wisconsin Attorney General's brief to this Court he still described the tax as an excise on the transfer of corporate earnings (pp. 37, 46 and *passim*), and sought to sustain it by analogy to cases of transfer and estate taxes in connection with devolution by death.

This Court's decision was based upon a new theory, not advanced below and not argued here, namely, that "the practical operation of this legislation is to impose an additional tax on corporate earnings within Wisconsin" (*Penney* opinion, p. 2), and that "by the Privilege Dividend Tax of 1935 Wisconsin superimposed upon this income tax a tax on corporate income that is paid out" (Id., p. 3).

No opportunity was afforded to argue either (1) whether such an additional income tax would be valid, or (2) whether a tax on the privilege of declaring or transferring dividends could be tested on the basis of its being a tax on income.

It may not be appropriate to argue at length in a petition for reargument, but several errors in this phase of the Court's ruling should at least be outlined.

(a) The first basis cited by this Court for its ruling was a statement that a special feature of the Wisconsin taxing system was the exemption of dividends from personal income tax, a fact which was described as giving "nourishing significance" to the tax under consideration (p. 3). This statement is incorrect.

The nature of the Wisconsin income tax system was not briefed or argued before this Court; the court's information appears to have been derived from the case of *Welch* v. *Henry*, 305 U. S. 134, which upheld a Wisconsin tax imposed in 1935 on certain 1933 dividends which had been exempt when received. Dividends on Woolworth stock were not and are not exempt from Wisconsin personal income tax. The Wisconsin statute permits the deduction from gross income only of dividends from corporations whose principal business is attributable to Wisconsin, which is defined as meaning corporations which derive 50% or more of their entire net income or loss from Wisconsin (Sec. 4(4), Chapter 71, Laws of Wisconsin, 1933). Admittedly, Woolworth derives less than 2½% of its total net income from Wisconsin (R. 4-5). Dividends paid by Woolworth to Wisconsin stockholders have been for many years and are at the present time taxed for normal income tax purposes. The opinion of this Court therefore is seen to be based upon a misconception of the Wisconsin income tax law.

This feature is of added significance when we consider that the present Wisconsin personal income tax discriminates against holders of stock in foreign corporations and in favor of holders of stock in corporations which derive 50% or more of their entire net income from Wisconsin sources. There is nothing inequitable in protecting foreign corporations from the incidence of the Wisconsin Privilege Dividend Tax when dividends of such foreign corporations are already subject to an income tax not imposed on dividends from local business.

(b) Another premise of the Court's opinion is that a determination of constitutionality is concerned only with the practical operation of the statute, and not the form of the tax. Again, the ruling is based (*Penney* opinion, p. 4) upon a citation (*Lawrence* v. *State Tax Commission*, 286 U. S. 276) which was not mentioned by the Wisconsin Attorney General. Moreover, the court presses the principle

to an extreme which we submit finds no basis in the actual holding of the *Lawrence* case.

The doctrine now advanced, that the Supreme Court, in passing on the validity of a tax, may disregard not only the description given to it by the Legislature and the measure prescribed in the statute, but also the considered judgment of the State court as to what is the nature of the tax, is one which was not invoked in this Court, which lacks support in the decisions of this Court, and which should not be adopted without an opportunity for thorough argument. The language of a statute and the construction given it by the state court should not be overthrown by the simple device of saying that the legislature and the court have used an improper "label". The importance of the precise terms of the statute was recognized by Justices Holmes and Moody, dissenting in *Chanler* v. *Kelsey,* 205 U. S. 466, 482, where they stated "that it has no bearing upon the matter, that by a different law the State might have derived an equal revenue from these donees in the form of a tax". Decisions of the state court concerning construction of a statute must be followed by the Supreme Court, even though the Supreme Court reserves the right to judge the actual operation of the tax (*Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; 294; *Morehead* v. *New York, ex rel Tipaldo,* 298 U. S. 587, 609). Less than six months ago, this Court unanimously held that "the determination of the State court as to the incidence of the tax has great weight with us and, when it follows logically the language of the act, as here, is controlling." (*Colorado National Bank* v. *Bedford,* 310 U. S. 41, 52).

The *Bedford* case recognizes that the determination of what is the subject of a tax is a matter of construction rather than of mere "label", for the validity of the tax there depended on whether it was a tax on a national bank or a tax on its customers, and this Court followed the Colorado Court's construction of it as a tax on the customers. If the validity of the present tax depends—as the Court appears to consider—on whether it is a tax on earnings or on the transfer

of earnings,* the Wisconsin Court's determination that it is a tax on the transfer of earnings should equally be followed by this Court.

Even *Continental Assurance Co.* v. *Tennessee,* 85 L. Ed. * 42, which this Court cites in the Penney opinion, recognizes the conclusiveness of the state court's determination as to the incidence of the tax. In the *Continental Assurance* case a tax was upheld because the state court found it was levied upon the privilege of entering the state and engaging in the insurance business, although a similar tax had been held invalid when the state court construed the tax as being imposed upon the business of collecting premiums on policies insuring residents of the state (*Provident Savings Life Assurance Society* v. *Kentucky,* 239 U. S. 103, 111.)

(c) This Court construed the tax as a price for the privilege of carrying on business in Wisconsin, and held (Penney opinion, p. 5) that its validity flowed from the principle that a tax may be contingent upon events outside the state and still be sufficiently connected with transactions inside the state. The principle, so stated, may be valid, but it does not follow that this tax is valid. The principle was not invoked in the briefs or argument before this Court, and consequently no opportunity was afforded Woolworth to point out its basis or its limitations.

The Court (*Penney* opinion, p. 5), cited eight cases in support of its statement that a tax was not invalid because contingent upon events brought to pass without the taxing state. Only two of such cases were cited in the Wisconsin Attorney General's brief to this Court, and neither of those were cited for the point on which this Court relied. Examination of the cases cited by the Court reveals that all were quite different from the present situation. They in-

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* As pointed out in the *Woolworth* brief (p. 25), dividends of a New York corporation are not necessarily a distribution of earnings, but may be paid from contributed surplus, or from surplus resulting from a reduction of capital (N. Y. Penal Law, §664; Berle, Modern Corporations and Private Property 167n. 25).

volved questions which range from whether the protection given by Pennsylvania to the lives of its residents justified measuring a tax on a foreign life insurance corporation admitted to do business in Pennsylvania by premiums on policies insuring Pennsylvania residents even though collected outside Pennsylvania (*Equitable Life Assurance Society* v. *Pennsylvania*, 238 U. S. 143), to whether a state may impose death taxes upon the devolution from a resident of intangible property held by a trustee outside the State (*Curry* v. *McCanless*, 307 U. S. 357). In each case the tax was clearly on a local subject-matter. If the parties are afforded a fair opportunity to discuss fully and argue before this Court the distinction between such cases and the present case we feel sure that this Court will recognize on the rehearing that they do not justify the Wisconsin Privilege Dividend Tax.

The Court has treated this tax as being levied on a local subject matter (the Wisconsin income), but measured by a foreign contingency (declaration of dividends in New York State). This reverses the actual situation which exists under the statute and the Wisconsin Court's ruling: the statute and the opinion below place the tax on a foreign subject matter (the dividend declared in New York) and uses the local subject (the Wisconsin income) only as a measure of the tax on the foreign subject matter.

(d) This Court's decision violates the sound principle that a case should not be reversed on the basis of points which were not advanced in the lower court.

> *Southern Railway Co.* v. *Kentucky*, 274 U. S. 76, 90-91 (dissenting opinion by Brandeis, J.);
> *New York* v. *Kleinert*, 268 U. S. 646, 650;
> *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U. S. 626, 633;
> *Dewey* v. *Des Moines*, 173 U. S. 193, 199;

(e) Another consideration which is entitled to weight is the rule that where doubts exist as to constitutionality, a construction will be adopted, if admissible, which avoids the necessity of passing upon the constitutional question

(*Minnesota ex rel. Pearson* v. *Probate Court*, 309 U. S. 270, 274).

That the court was divided by five to four in the *Penney* case shows incontrovertibly that there was a serious constitutional question involved.

Analysis of the statute shows that it may be construed as applicable to certain foreign corporations without requiring that it be applied to Woolworth.

The tax is imposed "For the privilege of declaring and receiving dividends". Under the facts in the present record, it is clear that all acts relating to the declaration of dividends by Woolworth are performed outside Wisconsin and in New York, the state of its incorporation. Many corporations, however, hold their directors' meetings in states other than that of their incorporation. The statute would apply to a foreign corporation which has its principal place of business in Wisconsin and declares its dividends there—and whose stockholders, incidentally, enjoy exemption from personal income tax. There is no compulsion in its terms that it apply to foreign corporations which declare their dividends in the state of their incorporation, and have no business situs in Wisconsin.

2. The second ground for asking rehearing is that the Court sitting on the Woolworth case was equally divided, and the normal result should have been an affirmance of the Wisconsin decision holding the tax invalid as to Woolworth.

The *Penney* case and the accompanying *Minnesota Mining* case (No. 48, October Term, 1940), were decided by five to four. The Woolworth case was argued at the same time as those cases. Mr. Justice Stone, who was one of the majority in the *Penney* and *Minnesota Mining* cases, took no part in the decision of the Woolworth case. It therefore appears that the Court was divided four to four on the principles applicable to the Woolworth case. This should have brought about an affirmance of the decision of the Wisconsin court on the Woolworth case, under the principle stated in *Hertz* v. *Woodman*, 218 U. S. 205, 212-13, that it has been "the

invariable practice to affirm, without opinion, any judgment or decree which is not decided to be erroneous by a majority of the court sitting in the cause." If the Woolworth case had been argued alone it would have resulted in an affirmance by an equally divided court. Instead, it resulted in a decision which simply stated "Per curiam: The judgment is reversed on the authority of *Wisconsin* v. *Penney Company.*"

There is a special ground for requesting opportunity to be fully heard on all the points which have been relied on in the Court's opinion when they not only were not raised or argued by the briefs but also were the subject of so close a division within the Court.

CONCLUSION.

The petition for rehearing should be granted and the case reassigned for argument on new or supplemental briefs.

New York, January 9, 1941.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

The undersigned hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

MARTIN A. SCHENCK
ORRIN G. JUDD